



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE ST.
CALIFORNIA

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Investigation on the Commission's Own
Motion into the Operations, Practices, and
Conduct of Comcast Phone of California, LLC
(U-5698-C) and its Related Entities
(Collectively "Comcast") to Determine
Whether Comcast Violated the Laws, Rules,
and Regulations of this State in the
Unauthorized Disclosure and Publication of
Comcast Subscribers' Unlisted Names,
Telephone Numbers, and Addresses.

I.13-10-003
(Filed October 3, 2013)

**JOINT OPENING POST-HEARING BRIEF
OF THE UTILITY REFORM NETWORK AND THE GREENLINING
INSTITUTE ON COMCAST'S PUBLISHING OF UNPUBLISHED AND UNLISTED
NAMES, TELEPHONE NUMBERS, AND ADDRESSES OF COMCAST SUBSCRIBERS**

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF RECOMMENDATIONS	1
A.	Parties and Authority	1
B.	Summary of Recommendations (Rule 13.11).....	1
C.	Questions Presented	4
II.	BACKGROUND	4
A.	Factual	4
B.	Procedural	6
1.	Comcast Deliberately Delayed Reporting the Systemic Flaws Until after Comcast Successfully Lobbied for Legislation Purporting to Restrict the Commission’s Jurisdiction.	6
2.	Comcast Deliberately Abused the Discovery Process to Withhold Information that Was Unfavorable to Comcast.	7
3.	Comcast Continues to Minimize its Disregard for, and Responsibility to, its Customers.	9
4.	Comcast’s Behavior Throughout this Proceeding Demonstrates Comcast’s Habit and Custom of Avoiding its Responsibilities to its Customers.	9
III.	FACTUAL ISSUES.....	10
A.	The Unlawful Releases Were the Result of a Business Model that Permitted Multiple Errors.	10
B.	Comcast Itself Does Not Know how Broadly the Records were Disseminated.....	11
C.	Comcast’s Unlawful Releases of Customer Information Likely Began Prior to July 1, 2010, and Appear to be Ongoing.	12
D.	Comcast Has Not Provided a Clear Explanation of How It Discovered the Releases.....	12
E.	Comcast Could Have Discovered the Releases Earlier.	12
F.	Comcast’s Notification to, and Remedies for, Affected Customers Were Insufficient.	14
1.	Comcast’s Notification to Affected Customers Was Insufficient.	14
2.	Comcast’s Remedies for Affected Customers Were Insufficient.....	15
3.	Comcast’s Compensation to Affected Customers Was Insufficient.	16
IV.	LEGAL ARGUMENT.....	17
A.	Jurisdiction.....	17
1.	Public Utilities Code Section 710 Does Shield Comcast from Liability.	17
2.	A Comcast Phone (a CPCN holder) contract led to the unauthorized publication and disclosure of the PII of nearly 75,000 customers.	18
3.	The Commission should disregard the corporate forms of Comcast, Comcast Phone, and Comcast IP.....	19
a.	The Comcast Entities in this Proceeding had a Unity of Interest.	19

i. The Comcast Entities Share Offices, Employees, and Attorneys.....	20
ii. The Comcast Entities Failed to Maintain an Arm’s Length Relationship.	20
iii. Comcast Uses Comcast Phone to Procure Telephone Numbers for Comcast IP.....	21
iv. There is a Unity of Interest and Ownership Between the Comcast Entities.	22
b. The Commission’s Recognition of the Comcast Entities’ Corporate Forms would Sanction Fraud and Promote Injustice.....	22
c. Under the Alter Ego Doctrine, the Commission Should Ignore the Corporate Forms of the Comcast Entities.....	23
B. Evidentiary Standard.....	23
C. Alleged Violations of Law.....	24
1. Public Utilities Code	24
a. Public Utilities Code sections 2891 & 2891.1 are Strict Liability Offenses.	24
b. Comcast has violated Public Utilities Code section 2891.	25
a) Comcast Has Violated Public Utilities Code Section 2891, Subdivision (a)(1).	25
b) Comcast Has Violated Public Utilities Code Section 2891, Subdivision (a)(3).	25
c) Comcast Has Violated Public Utilities Code Section 2891, Subdivision (a)(4).	26
c. Comcast Has Violated Public Utilities Code Section 2891.1, Subdivision (a).....	26
d. Comcast Has Violated Public Utilities Code Section 451.....	27
2. Comcast Phone and Comcast IP Violated Public Utilities Code Section 2111.	28
D. The Commission Should Impose Substantial Monetary and Non-Monetary Sanctions Against Comcast.....	28
1. The Commission Should Impose Sanctions Pursuant to Public Utilities Code Section 2107.....	29
2. The Commission Should Impose Sanctions Pursuant to Public Utilities Code Section 2108.....	29
3. The Commission Should Impose Monetary Sanctions Against Comcast.	30
E. The Commission Should Require Comcast to Provide Restitution and/or Non-Monetary Remedies.....	30
1. The Commission Should Order Safety Protections.....	31
2. The Commission Should Order Restitution.	31
3. The Commission Should Order Comcast to Provide Improved Disclosure and Choice.....	32
4. The Commission Should Order a Reform of Comcast’s Complaint and Monitoring Processes.	33

5. The Commission Should Order Comcast to Perform a “Clawback” of Customer Information.	33
6. The Commission Should Require Comcast to Perform Regular Audits.	34
7. The Commission Should Deem Any Releases Signed by Affected Customers Unenforceable.	34
8. The Commission’s Orders Should be Binding on Any Successor Entities.	34
V. CONCLUSION.....	35

TABLE OF AUTHORITIES

CALIFORNIA STATUTES

Elections Code section 14201, subdivision (c)	32
Public Utilities Code section 451	27
Public Utilities Code section 710.....	17
Public Utilities Code section 2101	28, 29
Public Utilities Code section 2107.5.....	28, 29
Public Utilities Code section 2108.....	28, 29
Public Utilities Code section 2111	27
Public Utilities Code section 2891	25
Public Utilities Code section 2891, SUBDIVISION (a)(1)	25
Public Utilities Code section 2891, SUBDIVISION (a)(3)	25
Public Utilities Code section 2891, SUBDIVISION (a)(4)	26
Public Utilities Code section 2891.1, Subdivision (a)	26

CALIFORNIA APPELLATE CASES

<i>Associated Vendors, Inc., vs. Oakland Meat Company</i> , 210 Cal.App.2d 825 (1962).....	20
<i>Communist Party v. 522 Valencia, Inc.</i> , 35 Cal. App. 4th 980 (1995)	19
<i>F. Hoffman-La Roche v. Superior Court</i> , 130 Cal. App. 4th 782 (2005)	19
<i>Institute of Veterinary Pathology, Inc. v. California Health Labs., Inc.</i> , 116 Cal. App. 3d 111 (1981)	19
<i>Sonora Diamond Corp. v. Superior Court</i> , 83 Cal. App. 4th 523 (2000).....	22
<i>Tomaselli v. Transamerica Ins. Co.</i> , 25 Cal. App. 4th 1269 (1994).....	22
<i>Webber v. Inland Empire Investments, Inc.</i> , 74 Cal. App. 4th 884 (1999).....	22

COMMISSION DECISIONS

Investigation on the Commission’s Own Motion into the Operations, Practices, and Conduct of Qwest Communications Corporation, D.02-10-059 (October 24, 2002)	23
In re Communications TeleSystems International, D.97-05-089	24, 31, 34

I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

A. Parties and Authority

Pursuant to Rule 13.11 of the Rules of Practice and Procedure, the February 11, 2014 Scoping Memo, the August 25, 2014 ALJ Ruling to Extend Deadlines, and the modification of the briefing deadlines at the October 3, 2014 evidentiary hearing in this matter, The Utility Reform Network (TURN) and The Greenlining Institute (Greenlining) (collectively, Joint Consumers) file this Opening Brief in this Investigation of Comcast relating to its unauthorized disclosure and publication of the names, addresses, and telephone numbers of approximately 75,000 California customers.

B. Summary of Recommendations (Rule 13.11)

This proceeding involves Comcast's unauthorized disclosure and publication of approximately 75,000 California customers' names, addresses, and telephone numbers for a period of at least two and a half years. Comcast's disclosure of this information arose out of Comcast's overwhelming focus on the bottom line, which created a perverse disincentive for Comcast to create any systems or safeguards to protect consumers' privacy. The unauthorized releases of customer data on multiple occasions are the direct result of Comcast's failure to protect customer privacy.

Comcast's unlawfully published and listed numbers led to safety and privacy concerns for thousands of Comcast's customers. Comcast delayed responding to customer complaints about their unpublished numbers being published. When Comcast did respond to the problem, it did so half-heartedly by only contacting customers it found convenient to reach out to, and in a manner designed to minimize the chance of customers responding.

Comcast failed to inform the California Public Utilities Commission for a considerable time after Comcast alleges it first became aware of the privacy and safety breaches. After the Commission rightfully instituted an investigation into the privacy breach that affected approximately 75,000 customers, Comcast's sole goal continues to be to avoid responsibility. Now, though it cannot allege that there was no breach, it argues that this Commission lacks the authority to penalize it for the breach. Comcast simply does not acknowledge the magnitude of its actions. Comcast must be held accountable, and the Commission should hold Comcast accountable in a way that Comcast understands: the pocketbook. Joint Consumers recommend the following:

- The Commission should impose the following fines:
 - A per diem penalty of \$40,000/violation over 891 days, yielding a penalty amount of \$35.68 million.
 - An additional \$5 million penalty for Comcast's standard practice of releasing non-published numbers.
 - An additional \$1 million penalty for failing to provide just and reasonable service.
 - An additional \$892,000 for charging for services that it did not provide.
- The Commission should also impose restitution requirements and other non-monetary remedies:
 - Safety
 - Comcast must provide home security systems for three years for each customer with safety concerns, such as those in law enforcement or survivors of domestic violence.
 - Comcast must provide identity theft prevention services for three years for each customer with financial privacy concerns.
 - Restitution
 - Comcast must track down the remaining customers who did not receive a refund for each month that their numbers were published and provide them with those refunds.
 - Comcast must provide additional compensation in the amount of approximately \$270 per affected customer per year of the breach.

- If Comcast cannot locate all of the affected customers, Comcast must remit any unrefunded amounts to privacy groups that advocate on behalf of consumer privacy such as Electronic Frontier Foundation or Privacy Rights Clearinghouse.
- Disclosure and Choice
 - If a customer requests an unlisted or unpublished service, Comcast must provide a separate written notice to new customers disclosing the facts of the releases at issue in the proceeding. This requirement should be a condition precedent to Comcast charging those customers for unlisted or unpublished service.
 - Comcast must provide separate written notice disclosing the facts of the releases at issue in the proceeding to all current Comcast customers in California.
 - Comcast must re-send the notification letter (and any new messaging regarding the releases) with a notice that Comcast will provide the letter in languages other than English. This letter must state the total number of customers whose unlisted or unpublished information was released without authorization between Jan. 1, 2010 and December 31, 2013.
- Reform of Complaint/Monitoring Process
 - Comcast must comply with the requirements suggested by SED related to standards of practice for handling unpublished customer names, addresses, and telephone numbers; related privacy customer complaints; and similar types of process errors and mandatory reporting requirements.
 - Joint Consumers may petition the Commission should Comcast fail to adhere to the standards of practice implemented.
- Clawback
 - Comcast must attempt to remove customers' unlawfully released information from the Internet.
 - Comcast must provide an internet scrubbing service for each affected customer for a period of three years from the Commission's final decision in this proceeding.
 - Comcast must fully reimburse affected customers who have already purchased Internet scrubbing services because of Comcast's privacy breach.
- Audit
 - Comcast must comply with the requirements suggested by SED related to mandatory audits and reporting requirements.

- Joint Consumers should have access to any reports that Comcast provides to the Commission.
- Joint Consumers may petition the Commission should Comcast fail to comply.
- Releases
 - Comcast may not enforce the confidentiality provisions of the releases signed by customers who settled their claims with Comcast because of the process error, and may not include confidentiality clauses in any future settlements with customers regarding the process error.
 - Comcast must inform consumers who signed releases that the confidentiality provisions of these contracts are no longer enforceable.
- Successor Entities
 - Any remedies that the Commission imposes on Comcast should be binding on any Comcast successor entities.

C. Questions Presented

Comcast does not dispute the fact that it released the unlisted and/or unpublished information of over 75,000 customers. From Joint Consumers' perspective, the primary outstanding factual questions are: (1) what caused the releases of that information; (2) why Comcast failed to prevent the releases; (3) what caused Comcast's delays in detecting and remedying the breach; (4) whether Comcast took appropriate steps to notify customers and make those customers whole; (5) why Comcast delayed reporting the releases to the Commission; (6) whether Comcast broke any laws; and (7) what monetary and non-monetary remedies are appropriate.

II. BACKGROUND

A. Factual

This proceeding involves Comcast, a company that was focused on increasing its profits from the provision of directory listings by any means necessary. To achieve this goal, Comcast

took actions which it knew would increase revenue, and did not take any actions which might reduce that revenue. Comcast's actions resulted in a system that did not contain any safeguards to protect consumers' directory listings, neglected to report flaws in or breaches of the system, and hid the risks of possible disclosure from consumers.

Not unexpectedly, this seriously flawed system resulted in Comcast's unlawfully releasing the telephone numbers and demographic information of almost 75,000 California subscribers who had paid for an unlisted or unpublished access number. While these unlawful releases began at least as early as late 2009¹, Comcast has been unclear regarding when the unlawful releases actually began. While Comcast "fixed" the problem in December 2012, much of the unlawfully released information is still available online. Additionally, Comcast continues to unlawfully release customer telephone number and demographic information despite its contentions that the errors leading to the unlawful releases have been cured.

Comcast's response to customers was consistent with Comcast's focus on maximizing revenue. Comcast's notice to customers was insufficient and designed to minimize the possibility that customers would actually seek a remedy. For those customers that did respond, Comcast offered remedies that resulted in a minimal actual cost to Comcast. Additionally, Comcast imposed seriously restrictive conditions on those remedies; those conditions made it impossible for customers to evaluate the fairness of the remedy or remedies they chose.

¹ Exhibit COM 103, Donato Direct Testimony, at 12: 4-8.

B. Procedural

Comcast's procedural position in this proceeding similarly reflects a motivation to minimize costs. Comcast expresses remorse, but then takes steps to avoid responsibility for the releases by attempting to avoid the Commission's jurisdiction, abusing the discovery process, and trivializing the effect of the releases.

1. Comcast Deliberately Delayed Reporting the Systemic Flaws Until after Comcast Successfully Lobbied for Legislation Purporting to Restrict the Commission's Jurisdiction.

At the same time that Comcast was disclosing customers' unlisted information, it also supported SB 1161, a bill that severely restricts the California Public Utilities Commission's authority to impose consumer protections on Voice over Internet Protocol providers.² Comcast was one of SB 1161's strongest proponents and supporters.³ While it is unclear to what extent Comcast lobbied in support of SB 1161, it appears that Comcast did not raise the issue of unauthorized releases of information with any of the legislators it met with during the process. Moreover, Comcast did not inform legislators that SB 1161 would limit the Commission's authority to punish any privacy breach related to unpublished numbers.

Additionally, while Comcast admits that it discovered the disclosures no later than early October 2012, it did not report the disclosures until January 9, 2013, nine days after SB 1161

² SB 1161 was eventually enacted as Public Utilities Code section 710.

³ An April 17, 2012 committee bill analysis listed Comcast Communications as a supporter of the legislation, and Comcast continued to support SB 1161 throughout the legislative process. See Sen. Energy, Utilities and Commc'ns Committee, Analysis of Sen. Bill 1161 (2011-2012 Sess.), *available at* http://leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1161_cfa_20120413_162757_sen_comm.html.

went into effect.⁴ Comcast admits that its disclosure of the unlisted numbers was a violation of CPUC rules at the time the disclosure occurred, but now argues that the CPUC has no jurisdiction to investigate or impose penalties against Comcast because of SB 1161.⁵

2. Comcast Deliberately Abused the Discovery Process to Withhold Information that Was Unfavorable to Comcast.

Throughout the proceeding, Comcast consistently objected to discovery requests, while at the same time providing piecemeal, incomplete responses to those discovery requests that were favorable to Comcast. For example, when SED proffered data requests after the ALJ's assigned date for close of discovery, Comcast generally objected to turning over any information.⁶ However, Comcast then took advantage of the discovery cut-off as an opportunity to only respond to Comcast-selected requests and provide partial responses consisting of Comcast-

⁴ California Public Utilities Commission, Investigation on the Commission's Own Motion Into the Operations, Practices, and Conduct of Comcast Phone of California LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses, I.13-10-003 (Oct. 3, 2013) (hereafter, Comcast Unlisted Numbers OII).

⁵ California Public Utilities Commission, Investigation on the Commission's Own Motion Into the Operations, Practices, and Conduct of Comcast Phone of California LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses, Motion to Dismiss of Comcast Phone of California, LLC and its Affiliates, I.13-10-003, Nov. 18, 2013 (hereafter Comcast Motion to Dismiss).

⁶ See, e.g., Motion of The Safety and Enforcement Division for an Order Compelling Production of Information and Documents Pursuant to Staff Data Requests at 2 (Feb. 11, 2014).

selected documents.⁷ It is fair to assume that Comcast's incomplete responses consisted of documents favorable to Comcast's case.

Similarly, Comcast regularly refused to respond to data requests citing statutory or contractual prohibitions, but was willing to make exceptions or compromises to those refusals in order to turn over evidence favorable to Comcast. For example, until the last day of hearing, Comcast took the position that the Electronic Communications Privacy Act (ECPA) prohibited Comcast's disclosure of specific customer information.⁸ However, it appears that Comcast was willing to make an exception to that rule when such an exception would help its case. At hearing, SED introduced evidence that a current Comcast customer had paid for unlisted service, but Comcast was publishing that customer's information.⁹ Comcast initially claimed that it was legally prohibited from discussing the customer,¹⁰ but subsequently reversed its opinion after some "internal discussion" between Comcast and its attorneys.¹¹ Comcast then provided data regarding that customer indicating that the customer was not currently paying for unlisted service.¹² Based on Comcast's earlier steadfast refusal to disclose allegedly protected material, it is fair to assume that Comcast reversed its position in order to provide the court with evidence that was favorable to Comcast. Additionally, the Commission should make the inference that Comcast's earlier refusal to turn over the allegedly protected material was not based on a good-

⁷ See Hearing Transcript at 547:20-25.

⁸ See, e.g., Motion of The Safety and Enforcement Division for an Order Compelling Production of Information and Documents Pursuant to Staff Data Requests at 2 (Feb. 11, 2014).

⁹ Exhibit SED-11.

¹⁰ Hearing Transcript at 440:21-27.

¹¹ See Hearing Transcript at 441:5-8.

¹² Hearing Transcript at 614:6-12.

faith reading of ECPA; rather, it was because that material contained evidence harmful to Comcast.

3. Comcast Continues to Minimize its Disregard for, and Responsibility to, its Customers.

Throughout these proceedings, Comcast has attempted to minimize the extent and seriousness of its failures. Comcast has pushed back at any characterization of the unlawful releases of data as “data breaches” or “unauthorized disclosures.” Comcast continues to try to recast the facts of this case, characterizing Comcast’s actions as the result of a “process error,” which occurred because “two different teams worked on the account number change and the query to the POI Table for the XFINITY Voice listings, and the teams did not understand the impacts of their projects on each other’s work.”¹³ However, one of Comcast’s witnesses revealed that the teams were simply unaware of the impact that their projects would have on the accuracy of Comcast’s unlisted/unpublished number information.¹⁴ Accordingly, the releases of those numbers, or of any of the almost 75,000 numbers, was not the result of an **error** on the part of a few employees—rather, it was the result of Comcast’s deliberate disregard for its customers’ privacy.

4. Comcast’s Behavior Throughout this Proceeding Demonstrates Comcast’s Habit and Custom of Avoiding its Responsibilities to its Customers.

Comcast’s behavior throughout this proceeding bolsters the evidence that the unlawful releases of almost 75,000 consumer records was the result of Comcast’s business decision to not

¹³ Exhibit COM 103, Donato Direct Testimony at 13:5-7.

¹⁴ *Id.* at 17-21.

create any systems or procedures to protect against Comcast's releases of unlisted or unpublished customer information. While Comcast has made vague assurances such as "we take this very seriously," and that it wants to do the right thing by its customers, Comcast's specific behavior during this proceeding tells a very different story. Comcast's constant attempts to avoid the Commission's Jurisdiction, abuse the discovery process to unfair advantage, and mischaracterize the facts are evidence that Comcast is not truly concerned about its customers' privacy. Rather, this behavior is consistent with Comcast's drive to minimize cost to the detriment of its customers.

III. FACTUAL ISSUES

A. The Unlawful Releases Were the Result of a Business Model that Permitted Multiple Errors.

It is important to show how the releases occurred in order to determine how long the breach has existed and how widely the non-published customer information were disseminated. Comcast admits to the privacy breach through a state-wide reassignment of account numbers to all California customers in October and December of 2009.¹⁵ This occurred because of a process error in the production and dissemination of its subscribers' listings to Targus/Neustar, which is responsible for licensing and selling Comcast subscriber listings.¹⁶

Joint Consumers agree with SED that even assuming Comcast's facts were true and complete, it is apparent that the error was due to the default setting for the published/non-published data field in the POI Table had no "privacy flag" on the accounts of approximately

¹⁵ *Id.* at 10-12.

¹⁶ Exhibit COM 103C, Donato Direct, at 3:8-4:8.

75,000 affected customers, as transmitted to Comcast’s online repository of information.¹⁷ From there, they were distributed to Targus/Neustar and ultimately distributed to Ecolisting, Kgb, and several smaller directory publishers.¹⁸ Comcast states that it corrected the issue,¹⁹ but it appears that the publication of non-published numbers is not entirely attributable to the “process error,” but is instead an ongoing and chronic problem.²⁰

B. Comcast Itself Does Not Know how Broadly the Records were Disseminated.

As a result of Comcast’s decision to work with and send almost 75,000 non-published customer records to Targus/Neustar, the personal information of approximately 75,000 non-published customers whose accounts were not properly flagged were exposed to the risk that they would be incorporated into some of Targus’ data products designed for other agencies and customers. Comcast admits that, for at least a year and perhaps considerably longer, the non-published account information that it provided Targus was then passed on to Kgb, a national directory assistance provider servicing many companies. Comcast produced witnesses who testified that they had no idea where the Comcast numbers ended up.²¹ Thus, Comcast itself does not know how broadly the records were disseminated.

¹⁷ *Id.* at 4:11-13 (“The error occurred with the process that was used to identify and flag Non-Published Listings for distribution to Comcast’s directory listing vendor (Neustar) and Frontier (in California”).

¹⁸ *Id.* Listings without the privacy flag were apparently also sent directly to the small LECs like Frontier, or their designated publishers, by the data query “process” – as Ms. Donato puts it. See HT at 410: 20-28 and Exhibits SED 15C and COM 114C.

¹⁹ Exhibit COM 103C, Donato Direct, at 26:21-31:16.

²⁰ See Hearing Transcript at 457:1-6.

²¹ Hearing Transcript at 578:27-579:3.

C. Comcast's Unlawful Releases of Customer Information Likely Began Prior to July 1, 2010, and Appear to be Ongoing.

Joint parties support SED's assertion that the non-published customer information may have been leaked before July 1, 2010, and that non-published information remained in directories long after December 10, 2012. As for the end-date, Ms. Donato claims that except for Plaxo all of the directory breaches were remedied by year-end 2012,²² and specifically states that non-published numbers going to Frontier and its publishers ended in 2011.²³ Jane Doe 10 attaches a 2012-2013 telephone book from Frontier territory that has her non-published name, address and telephone number in it, which shows that for many customers, the data breach may have continued.²⁴

D. Comcast Has Not Provided a Clear Explanation of How It Discovered the Releases

Comcast claims that it was unaware of the breach until October 2012.²⁵ Comcast has not provided a clear explanation how this problem was identified.²⁶

E. Comcast Could Have Discovered the Releases Earlier.

On Comcast's own terms, it took only *two* CR trouble tickets for it to discover the breach in October 2012.²⁷ But Ms. Donato, the woman who investigated the trouble tickets related to

²² Exhibit COM 103C, Donato Direct, at 7 (chart).

²³ *Id.* at 22:7-8 ("this process ended in 2011").

²⁴ Exhibit SED 003, Rahmon Rebuttal, at Attachment B.

²⁵ Exhibit COM 103C, Donato Direct, at 13:23-25.

²⁶ See, e.g., Hearing Transcript at 458:2-12.

²⁷ See Exh. COM 103, Donato Direct Testimony at 3:9-13 ("In October 2012 Comcast received two XFINITY Voice customer complaints stating that the customers' Non-Published directory

these two customer complaints,²⁸ was unable to explain why these trouble tickets were any different than the hundreds of trouble tickets about non-published issues that had gone before.²⁹ Any of these trouble tickets would have triggered Comcast's discovery of the process error had Comcast performed a "root cause analysis".³⁰

Comcast had multiple opportunities to discover the breach as evidenced by the California Trouble Tickets, contacts from California customers who also had called Comcast before discovery of the breach, and Comcast internal emails warning of problems with non-published numbers.³¹

Comcast argues that it could not reasonably have been expected to discern the smaller sample of California customers affected by a privacy breach.³² Even so, the fact that Comcast claims that it had no way to detect a privacy breach affecting thousands of consumers demonstrates that Comcast lacked any substantial commitment to protecting its customers' confidential information.

listing information was appearing in Ecolisting (Comcast's online directory listing website). Comcast began an investigation which ultimately revealed that the root cause of the issue identified by those two customers was a systemic problem that began in 2009 (the "Process Error").

²⁸ Exh. COM 104, Donato Rebuttal, at 20:2-5.

²⁹ Hearing Transcript at 456:6-11.

³⁰ See Exh. COM 106, Stephens Rebuttal Testimony at 18:12-15.

³¹ See SED Opening Brief

³² Exhibit COM 106, Stephens Rebuttal Testimony, at 11, and 4-21 generally.

F. Comcast's Notification to, and Remedies for, Affected Customers Were Insufficient.

1. Comcast's Notification to Affected Customers Was Insufficient.

As SED notes, Comcast took steps to minimize the possibility that affected customers would actually receive notice of the release of their information, including minimal efforts to reach past customers by mail, the removal of an option to speak to a live agent from Comcast's "robo-call" notifying customers of the release, and Comcast's ongoing unwillingness to make a public statement or issue a press release. Joint Consumers share SED's views that Comcast notification efforts were insufficient, and this view is amply supported by the record. For example, while some of the affected customers purchased bundled service including broadband, Comcast did not attempt to contact those customers via those customers' email addresses on record with Comcast.³³

Joint Consumers are particularly disturbed by the fact that Comcast only attempted to notify affected customers in English. Comcast presented Christina Stephens, Director of Customer Relations for Comcast Cable for the West Division, to describe how Comcast "notified, refunded and otherwise assisted residential customers" affected by Comcast's releases of customer listings.³⁴ Ms. Stephens testified that she made no attempt to determine whether any of the affected customers spoke a language other than English.³⁵ While Comcast sent a letter notifying customers about the disclosure to affected customers, that letter was provided only in

³³ Hearing Transcript at 558:10-13.

³⁴ Exh. COM 105, Stephens Direct, at 2:3-4.

³⁵ Hearing Transcript at 556:21-25.

English.³⁶ 760 customers called Comcast's toll-free number in the notification letter; it appears that none of those customers used a language other than English.

2. Comcast's Remedies for Affected Customers Were Insufficient.

Comcast failed to adequately compensate its customers for its breach of privacy. Many customers paid for unpublished numbers because they were in law enforcement or had other safety and privacy concerns.³⁷ As a company only concerned with its own bottom line, Comcast contacted few customers and reimbursed them a paltry \$1.50 credit for each month the number was unpublished.³⁸ Not all of the affected customers received the credit, because Comcast's sole effort to provide refunds to past customers was sending a letter to a customer's last known address.³⁹ Some customers received free service for a limited period of time.⁴⁰ For the very small number of customers who actually received notice and went through the laborious process of obtaining further compensation, those customers received remedies ranging from monetary relief⁴¹ to a service credit or promotion⁴² to nothing at all.⁴³

Interestingly, when addressing the service credits, rebundlings, or promotions provided to some of the customers, Comcast describes those credits, rebundling, and promotions in terms of

³⁶ *Id.* at 555:27-556:3.

³⁷ *Id.* at at 8:20-25, 9:16; 72:17-19; 323:3-324:9 and 330:16-20.

³⁸ *Id.* at 9:4-11; 72:17-19 and 73:9-11; 327:22-328:24 and 329:27-330:20.

³⁹ Exh. COM 105, Stephens Direct, at 8:3-7.

⁴⁰ Hearing Transcript at 9:4-11

⁴¹ Exh. COM 106, Stephens Rebuttal, at 32:15-16.

⁴² *Id.* at 33: 1-3

⁴³ *Id.* at 33: 3-7.

the value to the customer.⁴⁴ By describing the credits in those terms, Comcast conveniently avoids the fact that Comcast's actual cost of providing those credits, rebundlings, and promotions was far less than the "value to the customer."

3. Comcast's Compensation to Affected Customers Was Insufficient.

Based on the statements of customers affected by the releases, these remedies were woefully insufficient.⁴⁵ Comcast did not offer to pay for internet scrubbing, causing some customers to have to sign up for Internet scrubbing on their own.⁴⁶ Many customers, particularly those in law enforcement, expressed ongoing concerns about safety. For example, John Doe 1, an FBI agent,⁴⁷ testified that "[i]n my line of work, and the work that my ex-wife was doing also the same line of work, having access to a person's telephone number can lead to detrimental results in your personal life and your professional life."⁴⁸ Another witness stated "I've been in law enforcement for 20 years, over 20 years...Because of my work, and the cases that I've work[ed] on, there is always the threat of safety or retaliation by defendants towards my family, my house. Two different homes have been burglarized. My car has been broken in. I've done everything I can to make my life, my family members private, information private..."⁴⁹ A refund and a token payment is insufficient to compensate the customers affected by the releases.

⁴⁴ See Exh. COM 106, Stephens Rebuttal, at 33:1-2.

⁴⁵ Hearing Transcript at 72:17-19 and 73:9-11.

⁴⁶ *Id.* at 327:22-328:24, 329:27-330:20.

⁴⁷ *Id.* at 9:16.

⁴⁸ *Id.* at 8:20-25.

⁴⁹ *Id.* at 323: 3- 324:9.

IV. LEGAL ARGUMENT

A. Jurisdiction

1. Public Utilities Code Section 710 Does Shield Comcast from Liability.

Comcast attempts to evade liability for its breach of privacy by alleging that the Commission has no authority to penalize its behavior. In an ongoing effort to minimize its costs, Comcast claims that the Public Utilities Code (PUC) Section 710 prohibits the Commission from exercising jurisdiction over the breach of privacy.

However, PUC Section 710, prohibiting the Commission from “exercis[ing] regulatory jurisdiction or control” over Voice over Internet Protocol (VoIP), except as authorized under federal or state law, does not apply in the instant matter. PUC Section 239(a)(1) defines VoIP services as a “voice communications service” that:

- (A) Uses Internet Protocol or a successor protocol to enable real-time, two-way voice communication that originates from, or terminates at, the user’s location in Internet Protocol or a successor protocol.
- (B) Requires a broadband connection from the user’s location.
- (C) Permits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

This case is about the unauthorized publication of private customer information in phone directories even though customers paid a fee to that information from the public. The listings do not use Internet protocol “to enable real-time, two-way voice communication,” necessitate use of a broadband connection, and do not allow permit users to receive or terminate calls to the public

switched telephone network. Instead when customers paid for the service, they “expected for that number to be non-published.”⁵⁰

2. A Comcast Phone (a CPCN holder) contract led to the unauthorized publication and disclosure of the PII of nearly 75,000 customers.

In another attempt to minimize costs and liability, Comcast tries to confuse the issue by alleging that another company is in fact liable – Comcast IP. Comcast Phone acknowledges that it holds a Certificate of Public Convenience and Necessity (CPCN)⁵¹ and, thus, is regulated by this Commission. Comcast Phone entered into a contractual agreement with Comcast IP for the former to provide to the latter local interconnection service, including the assigned telephone numbers in the instant matter. *See* Munoz Exhibit C (Direct) Confidential of Direct Testimony of Robert Munoz on Behalf of Comcast (Confidential Version). The agreement led to the publication and release of nearly 75,000 subscriber names, addresses, and telephone numbers in California online and print telephone directories and made available through directory assistance. Comcast Phone is left to argue that only one party to the agreement, Comcast IP, is liable for the privacy breach. Both parties signed the contract. This is merely another way for Comcast to attempt to evade responsibility for its actions. Despite Comcast’s failed attempts at obfuscation, Comcast’s actions led to the publication and disclosure of the names, telephone numbers, and addresses of approximately 75,000 California customers. Therefore, the Commission has authority over the regulated entity that is responsible for the violation – Comcast Phone.

⁵⁰ *See* Hearing Transcript at 6:26-28. *See also, e.g.,* Hearing Transcript at 71:19-72:2, 72:17-19.

⁵¹ Motion to Dismiss of Comcast Phone of California, LLC (U-5698-C) and its Related Entities (Comcast Motion), filed November 18, 2013, at 17, fn.56.

3. The Commission should disregard the corporate forms of Comcast, Comcast Phone, and Comcast IP.

Under the alter ego doctrine, courts will impose liability “where the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former.”⁵² “The issue is not so much whether the corporate entity should be disregarded for all purposes or whether its very purpose was to defraud the innocent party, as it is whether in the particular case presented, justice and equity can best be accomplished and fraud and unfairness defeated by disregarding the distinct entity of the corporate form.”⁵³

A party seeking to establish that a company’s affiliate is an “alter ego,” i.e., not really a separate entity must show that (1) there is such a unity of interest and ownership between the corporations that the separate personalities of the corporations do not in reality exist, and (2) treating the acts in question as those of the corporation alone will lead to an inequitable result.⁵⁴

a. The Comcast Entities in this Proceeding had a Unity of Interest.

To invoke the alter ego doctrine, a claimant must first show that there “is such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist.”⁵⁵ Among others, courts have found the following factors to be indicators of a unity of interest: the use of the same

⁵² *Institute of Veterinary Pathology, Inc. v. California Health Labs., Inc.*, 116 Cal. App. 3d 111, 119 (1981)

⁵³ *Communist Party v. 522 Valencia, Inc.* 35 Cal. App. 4th 980, 994 (1995) (citations omitted).

⁵⁴ *See F. Hoffman-La Roche v. Superior Court*, 130 Cal. App. 4th 782, 796 (2005.).

⁵⁵ *Id.* at 796.

office or business location;⁵⁶ the employment of the same employees and/or attorney;⁵⁷ the disregard of legal formalities and the failure to maintain arm's length relationships among related entities;⁵⁸ and the use of the corporate entity to procure labor, services or merchandise for another person or entity.⁵⁹

i. The Comcast Entities Share Offices, Employees, and Attorneys.

The Comcast entities share offices and employees.⁶⁰ Comcast apparently cannot distinguish between Comcast Phone and Comcast IP employees.⁶¹ Additionally, throughout this proceeding the Comcast entities have been represented by the same attorneys. These attorneys have not solely represented the Comcast entities for the purposes of this proceeding: one of the attorneys representing the Comcast entities in this proceeding, Mr. Sloan, has represented Comcast since at least 2011.⁶²

ii. The Comcast Entities Failed to Maintain an Arm's Length Relationship.

There is ample evidence that the Comcast entities failed to maintain an arm's length relationship. Comcast's witness Bob Munoz struggled during cross-examination to articulate the specific services provided by the Comcast entity that he works for.⁶³ As discussed by SED in its

⁵⁶ *Associated Vendors, Inc., vs. Oakland Meat Company*, 210 Cal.App.2d 825, 839 (1962).

⁵⁷ *Id.*

⁵⁸ *Id.* at 840

⁵⁹ *Id.*

⁶⁰ OII at 5.

⁶¹ *Id.*

⁶² Mr. Sloan represented Comcast in a civil suit in Georgia, including writing an appellate brief. Hearing Transcript 593:23-28; 594:1-8.

⁶³ Hearing Transcript 371:11-12.

opening brief, the Comcast entities do not appear to distinguish between one another when signing contracts. Throughout these proceedings, Comcast's witnesses testified on behalf of **all** of the Comcast companies that were parties to the proceeding.⁶⁴ Additionally, the Comcast employee that handled the initial discovery of the errors was not an employee of Comcast Phone,⁶⁵ the Comcast employee that handled customer notification and refunds was not an employee of Comcast Phone,⁶⁶ the Comcast employee who was responsible for negotiating contracts with directory providers was not an employee of Comcast Phone,⁶⁷ and the Comcast employee who coordinated Comcast's responses to the Commission was not an employee of Comcast Phone.⁶⁸

iii. Comcast Uses Comcast Phone to Procure Telephone Numbers for Comcast IP.

Comcast states that it offers telephone service through Comcast IP.⁶⁹ However, Comcast IP does not have the ability to obtain telephone numbers from the North American Numbering Plan.⁷⁰ Comcast uses Comcast Phone to procure numbers from the North American Numbering Plan.⁷¹ Comcast then transfers those telephone numbers from Comcast Phone to Comcast IP.⁷²

⁶⁴ Exh. COM-101, Munoz Direct, at 2:18-19; Exh. COM-103, Donato Direct, at 2:8-9; Exh. COM-105, Stephens Direct, at 2:8-12; Exh. COM-107, Miller Rebuttal, at 1:10-11.

⁶⁵ See Exh. COM-103, Donato Direct, at 2:3-4.

⁶⁶ See Exh. COM-105, Stephens Direct, at 2:8-12.

⁶⁷ See Exh. COM-107, Miller Rebuttal, at 1:5-7.

⁶⁸ See Exh. COM-101, Munoz Direct, at 2:13-14.

⁶⁹ *Id.* at 8:19-20.

⁷⁰ *Id.* at 13:21-24.

⁷¹ *Id.* at 13:15-18.

⁷² *Id.*

Comcast's use of Comcast Phone to procure numbers to Comcast IP is the use of one entity to procure labor, services, or merchandise for another.

iv. There is a Unity of Interest and Ownership Between the Comcast Entities.

As discussed above, the Comcast Entities that are parties to this proceeding use same office or business location; employ the same employees and attorneys; disregard legal formalities and fail to maintain arm's length relationships among themselves; and use Comcast Phone to procure labor, services or merchandise for Comcast IP. Based on these factors, there is such a unity of interest and ownership between the Comcast entities that the separate personalities of the corporations do not in reality exist.

b. The Commission's Recognition of the Comcast Entities' Corporate Forms would Sanction Fraud and Promote Injustice.

Courts will invoke the alter ego doctrine "where recognition of the corporate form would work an injustice to a third person."⁷³ The alter ego doctrine "affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form."⁷⁴ Courts will not recognize the corporate form if doing so would "sanction a fraud or promote injustice."⁷⁵

Here, Comcast is invoking its corporate forms to avoid responsibility for its releases of almost 75,000 customer records containing unlisted or unpublished data. As discussed above,

⁷³ *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1285 (1994).

⁷⁴ *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 539 (2000).

⁷⁵ *See Webber v. Inland Empire Investments, Inc.*, 74 Cal. App. 4th 884, 900 (1999).

Comcast's notification efforts have been insufficient, and Comcast designed its notification process to minimize the number of customers that received actual notice of the release of their information. Throughout this proceeding, Comcast has sought to avoid the Commission's jurisdiction, abused the discovery process, and attempted to trivialize the effects of its failures. Comcast's response to the releases and behavior in this proceeding are evidence of Comcast's bad faith. Allowing Comcast to use its illusory corporate forms as a shield against its misconduct would harm the thousands of customers harmed by the releases, and would leave all of Comcast's customers vulnerable to the same sort of harms in the future. Accordingly, recognizing Comcast's corporate forms would lead to an unjust result.

c. Under the Alter Ego Doctrine, the Commission Should Ignore the Corporate Forms of the Comcast Entities.

As discussed above, the Comcast entities in this proceeding had a unity of interest. Additionally, the Commission's recognition of the Comcast entities' corporate forms in this proceeding would sanction fraud and promote injustice. Accordingly, the Commission should invoke the alter ego doctrine and ignore the corporate forms of the Comcast entities.

B. Evidentiary Standard

The Claimants have the burden of proving the allegations against Comcast.⁷⁶ Claimants also have the burden of proving any facts necessary for the Commission to impose sanctions.⁷⁷

⁷⁶ *In re Communications TeleSystems International*, D.97-05-089 (May 21, 1997).

⁷⁷ *Id.*

The standard of proof in Commission investigatory proceedings is the preponderance of the evidence standard.⁷⁸

C. Alleged Violations of Law

1. Public Utilities Code

a. Public Utilities Code sections 2891 & 2891.1 are Strict Liability Offenses.

Public offenses consist of two elements, an act or omission and a requisite mental state.⁷⁹ Statutes enacted for the protection of public health and safety (i.e., “public welfare offenses”) are “strict liability” offenses and do not require proof of a mental state element:

“...under may statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug violations, criminal sanctions are relied upon even if there is no wrongful intent. These offenses usually involve light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement.”⁸⁰

Telephone service is subject to a comprehensive regulatory scheme.⁸¹ Generally, failing to comply with sections 2891 and 2891.1 would not damage a provider’s reputation.⁸² Finally, enforcement of sections 2891 and 2891.1 would be difficult, if not impossible, if proof of

⁷⁸ *Id.*

⁷⁹ Investigation on the Commission’s Own Motion into the Operations, Practices, and Conduct of Qwest Communications Corporation, D.02-10-059, 72 CPUC 2d 621, 635 (October 24, 2002).

⁸⁰ *Id.*

⁸¹ *See Id.*

⁸² *See Id.*

criminal intent were required.⁸³ Accordingly, those sections are public welfare offenses, and do not require proof of the violator's mental state. SED does not need to prove Comcast's mental state, and any of Comcast's claims that the unlawful disclosure was "inadvertent" or an "error" is irrelevant to determination of whether Comcast violated those sections.

b. Comcast has violated Public Utilities Code section 2891.

a) Comcast Has Violated Public Utilities Code Section 2891, Subdivision (a)(1).

Public Utilities Code section 2891, subdivision (a)(1), prohibits a telephone or telegraph corporation from making a subscriber's telephone number available to any other person or corporation without first obtaining that residential subscriber's written consent. In the instant case, Comcast admits that it released the phone numbers of almost 75,000 residential subscribers.⁸⁴ Comcast has provided no evidence that it obtained written consent to do so from any of those subscribers. Accordingly, Comcast has violated Public Utilities Code section 2891, subdivision (a)(3).

b) Comcast Has Violated Public Utilities Code Section 2891, Subdivision (a)(3).

Public Utilities Code section 2891, subdivision (a)(3), prohibits a telephone or telegraph corporation from disclosing the services that a residential subscriber purchases to any other person or corporation without first obtaining that residential subscriber's written consent. By disclosing the phone numbers of almost 75,000 residential subscribers, Comcast necessarily

⁸³ *See Id.*

⁸⁴ Exh. COM-103, Donato Direct, at 3:20-22.

disclosed that those customers purchased phone service from Comcast. Comcast has provided no evidence that it obtained written consent to do so from any of those subscribers. Accordingly, Comcast has violated Public Utilities Code section 2891, subdivision (a)(3).

c) Comcast Has Violated Public Utilities Code Section 2891, Subdivision (a)(4).

Public Utilities Code section 2891, subdivision (a)(4), prohibits a telephone or telegraph corporation from disclosing demographic data about a residential subscriber to any other person or corporation without first obtaining that residential subscriber's written consent. Demographic information includes a person's location.⁸⁵ Comcast admits to releasing the addresses of residential subscribers. Comcast has provided no evidence that it obtained written consent to do so from any of those subscribers. Accordingly, Comcast has violated Public Utilities Code section 2891, subdivision (c).

c. Comcast Has Violated Public Utilities Code Section 2891.1, Subdivision (a).

Public Utilities Code section 2891.1, subdivision (a) provides that a telephone corporation that sells or licenses lists of residential subscribers cannot include the telephone numbers of any subscriber with an unlisted or unpublished number without a written waiver from the subscriber. In the instant case, Comcast admits that it licensed the phone numbers of almost

⁸⁵ See Cal. Pub. Util. Comm'n, CALIFORNIA BROADBAND REPORT A SUMMARY OF BROADBAND AVAILABILITY AND ADOPTION IN CALIFORNIA AS OF JUNE 30, 2011 (2011), available at http://www.cpuc.ca.gov/NR/rdonlyres/7D2EFC43-A4E3-46CE-BE3B-18E765CF4D08/0/California_Broadband_Report_June_2011_CPUCmmCLEAN.pdf (last accessed Nov. 4, 2014).

75,000 residential subscribers.⁸⁶ Comcast has provided no evidence that it obtained a written waiver from any of those subscribers. Accordingly, Comcast has violated Public Utilities Code section 2891.1, subdivision (a).

d. Comcast Has Violated Public Utilities Code Section 451.

Public Utilities Code section 451 states:

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

“Section 451 of the Public Utilities Code provides that all charges, services, instrumentalities, and rules of a public utility must be just and reasonable. Comcast’s conduct here may constitute breach of contract and defeat the reasonable expectations of privacy in those customers who specifically requested an unlisted telephone number. If so, such conduct cannot be considered just and reasonable.”⁸⁷ Joint Consumers share SED’s view that Comcast’s conduct at issue in this proceeding violated all three paragraphs of section 451.

⁸⁶ Exh. COM-103, Donato Direct, at 3:20-22.

⁸⁷ OII at 16.

2. Comcast Phone and Comcast IP Violated Public Utilities Code Section 2111.

Public Utilities Code section 2111 provides a penalty for any corporation or person, other than a public utility that “aids or abets any violation of any provision of the California Constitution relating to public utilities or of this part, or fails to comply with any part of any order, decision, rule...or aids and abets any public utility in the violation or noncompliance in a case in which a penalty has not otherwise been provided for the corporation or person.” If, as Comcast argues, Comcast IP is the sole liable entity, as a related entity aware of Comcast IP’s breach through customer complaints, Comcast Phone aided and abetted Comcast IP and should be penalized.

D. The Commission Should Impose Substantial Monetary and Non-Monetary Sanctions Against Comcast.

It is clear from Comcast’s own witnesses that Comcast continues to seek to minimize its costs and not fully take responsibility for its actions. Joint Consumers request that this Commission send a clear signal to Comcast to ensure that this type of flagrant disregard for the privacy of **all** of Comcast’s California customers does not happen again. Comcast did not have sufficient incentive to protect customers' privacy on its own; accordingly, it is incumbent upon the Commission to provide that incentive. Any remedies should ensure that it costs more for Comcast to **not** protect privacy than it costs Comcast to protect it. The Commission has the authority to do so pursuant to PUC Sections 2107, 2107.5, and 2108.

1. The Commission Should Impose Sanctions Pursuant to Public Utilities Code Section 2107.

Pursuant to PUC Section 2107, the Commission has the authority to set a penalty for Comcast's privacy violations:

Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense.

Under Public Utilities Code section 2107, The Commission may order fines payable to the State of California.⁸⁸ The Commission also has the authority to set a penalty for Comcast's privacy violations pursuant to PU Section 2107.5:

When the commission finds, after hearing, that any person or corporation has knowingly aided or abetted a common carrier in violating Section 45B or has violated Section 459, or any order, decision, rule, regulation, direction, demand, or requirement issued under those provisions, the commission may impose a fine for each violation, not to exceed five thousand dollars (\$5,000). In addition to the fine, the commission may impose interest on the fine, not to exceed the maximum rate of interest provided for in Section 1 of Article XV of the Constitution. Interest shall commence to accrue on the date when the payment of the fine becomes delinquent.

2. The Commission Should Impose Sanctions Pursuant to Public Utilities Code Section 2108.

Pursuant to PUC Section 2108, the Commission has the authority to set a penalty for Comcast's privacy violations:

Every violation of the provisions of this part or of any party of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a

⁸⁸ D.97-05-089.

continuing violation each day's continuance thereof shall be a separate and distinct offense.

Per sections 2107 and 2108, the Commissions has the statutory authority to impose a penalty for each day that the affected customers' information remained "in the wild."

3. The Commission Should Impose Monetary Sanctions Against Comcast.

Joint Consumers share SED's view that Comcast's abject failure to create any systems or safeguards to protect consumers' privacy, combined with the serious risk to affected customers with safety issues, justify the Commission's imposing a per diem penalty of \$40,000/violation over 891 days, yielding a penalty amount of \$35.68 million. Joint Consumers further support SED's recommended \$5 million penalty for Comcast's standard practice of releasing non-published numbers, \$1 million penalty for failing to provide just and reasonable service, and \$892,000 for charging for services that it did not provide.

E. The Commission Should Require Comcast to Provide Restitution and/or Non-Monetary Remedies.

Comcast's privacy breach has resulted in safety and privacy concerns for many of Comcast's affected customers for diverse reasons.⁸⁹ Comcast remains interested only in limiting liability. If Comcast receives no significant penalty as a result of this breach that affected nearly 75,000 Californians, they would be free to violate customers' privacy again, thinking that there will be no repercussions for its actions. Comcast must receive the message that disregarding customer privacy, ignoring customer complaints about unpublished numbers being published, hiding the problem from the Commission, and inadequately compensating customers for such a

⁸⁹ Hearing Transcript at 8:20-25 and 9:16; 72:17-; 323:3-324:9 and 330:16-.

breach will be severely penalized. Along with monetary remedies to consumers addressed above, Joint Consumers recommend the following:

1. The Commission Should Order Safety Protections.

Because safety and privacy are at the heart of this investigation, customers must know that they are safe again in their public and private lives in the aftermath of the privacy violation. Thus, in addition to the monetary compensation for customers enumerated above, Joint Consumers recommend that the Commission require that Comcast provide home security systems for three years for each customer with safety concerns such as those in law enforcement or victims of domestic violence. The Commission should also require that Comcast provide identity theft prevention services for three years for each customer with financial privacy concerns.

2. The Commission Should Order Restitution.

“The Commission...has specific authority to order reparations and refunds.”⁹⁰ The Commission should require that Comcast track down the remaining customers who did not receive a refund for each month that their numbers were published and provide them with a refund. Additionally, the Commission should order Comcast to provide additional compensation in the amount of approximately \$270 per affected customer per year of the breach. Comcast witness Phil Miller explained that Ecolistings grew out of a desire to take back control of listings from ILECs and to ensure that they no longer received the financial windfall of “tens of millions

⁹⁰ Investigation on the Commission’s Own Motion into the Operations, Practices, and Conduct of Qwest Communications Corporation, D.02-10-059, 72 CPUC 2d 621, 634-635 (October 24, 2002).

of dollars annually.”⁹¹ A conservative inference of the “tens of millions” recouped by Comcast would be \$20,000,000. Joint Consumers suggest that the \$20,000,000 should be divided amongst the 75,000 affected customers – approximately \$270 per person per year of the breach. The Commission should further order that if Comcast cannot locate all of the affected customers, Comcast must remit the surplus to privacy groups that advocate on behalf of consumer privacy such as Electronic Frontier Foundation or Privacy Rights Clearinghouse.

3. The Commission Should Order Comcast to Provide Improved Disclosure and Choice.

Joint Consumers share SED’s suggestions regarding the Commission’s requiring Comcast to reform its disclosure policies. Additionally, the Commission should require that if a customer requests an unlisted or unpublished service, Comcast must provide a separate written notice to new customers disclosing the facts of the releases at issue in the proceeding. This requirement should be a condition precedent to Comcast charging those customers for unlisted or unpublished service. The Commission should further require that Comcast provide separate written notice disclosing the facts of the releases at issue in the proceeding to all current Comcast customers in California.

As discussed above, Comcast did not attempt to contact affected customers in languages other than English. This fact creates a substantial risk that limited-English proficiency customers affected by the releases may not have received adequate notice. Accordingly, the Commission

⁹¹ Exh. COM-107, Miller Rebuttal, at 4:4-7.

should require that Comcast re-send the notification letter (and any new messaging regarding the releases) with a notice that Comcast will provide the letter in languages other than English.⁹²

4. The Commission Should Order a Reform of Comcast's Complaint and Monitoring Processes.

Joint Consumers ask the Commission to implement the requirements suggested by SED related to standards of practice for handling unpublished customer names, addresses, and telephone numbers; related privacy customer complaints; and similar types of process errors and mandatory reporting requirements. The Commission should authorize Joint Consumers to petition the Commission should Comcast fail to adhere to the standards of practice implemented.

5. The Commission Should Order Comcast to Perform a "Clawback" of Customer Information.

Joint Consumers share SED's view that Comcast be required to attempt to remove customers' unlawfully released information from the Internet. In addition to SED's recommendations, the Commissions should require Comcast to provide an internet scrubbing service or other privacy-related features for each affected customer for a period of three years from the Commission's final decision in this proceeding. Additionally, as discussed above the Commission should require Comcast to fully reimburse affected customers who have already purchased those services because of Comcast's privacy breach.

⁹² This notice should be provided in all of the languages that California law requires for election materials pursuant to Cal. Elec. Code § 14201, subd. (c).

6. The Commission Should Require Comcast to Perform Regular Audits.

Joint Consumers ask the Commission to implement the requirements suggested by SED related to mandatory audits and reporting requirements. As a further condition, Joint Consumers should have access to any reports that Comcast provides to the Commission. The Commission should authorize Joint Consumers to petition the Commission should Comcast fail to comply.

7. The Commission Should Deem Any Releases Signed by Affected Customers Unenforceable.

Joint Consumers ask the Commission to implement SED's request that the Commission order Comcast to not enforce the confidentiality provisions of the releases signed by customers who settled their claims with Comcast because of the process error, and to not include confidentiality clauses in any future settlements with customers regarding the process error. Additionally, the Commission should require Comcast to inform consumers that signed releases that the confidentiality provisions of these contracts are no longer enforceable.

8. The Commission's Orders Should be Binding on Any Successor Entities.

Consistent with past Commission precedent, any remedies that the Commission imposes on Comcast should be binding on any Comcast successor entities.⁹³ The Commission's binding successor entities is especially important in this proceeding: as discussed above, Comcast has attempted to hide behind its corporate forms throughout this proceeding. Joint Consumers are concerned that Comcast will attempt to avoid the Commission's remedies by dissolving the Comcast entities in this proceeding and creating new entities with the same responsibilities.

⁹³ In re Communications TeleSystems International, D.97-05-089 (May 21, 1997)

Accordingly, The Commission should order that the sanctions set out above are binding on any successor entities unless and until the Commission orders differently.

V. CONCLUSION

The unauthorized releases of customer data on multiple occasions is the direct result of Comcast's failure to protect customer privacy, driven by Comcast's disinterest in its customers' privacy. The release of almost 75,000 customers' private information raises serious safety and privacy concerns. Rather than addressing its mistakes, Comcast has done its best to dodge responsibility by trying to avoid the Commission's jurisdiction, abusing the discovery process, and minimizing the impact of Comcast's conduct. Comcast has demonstrated that it lacks the incentive to protect its customers' privacy on its own. Accordingly, Joint Consumers urge the Commission to provide that incentive for Comcast, make affected customers whole, and protect consumers' vital privacy interests.

Joint Consumers also recommend that the Commission reconsider privacy generally, as a safety concern and from the standpoint of individual choice. In this regard, the Commission might want to reconsider its decision not to entertain a privacy rulemaking, even if it was differently and more specifically framed than the one previously suggested.⁹⁴

November 4, 2014

Respectfully submitted,

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⁹⁴ In D.14-01-035, the Commission declined to initiate the privacy rulemaking requested by the Privacy Rights Clearinghouse, TURN, and Consumer Federation of California because of “lack of documented examples of actual breaches of customer privacy by telecommunications corporations.” Slip Op. at 1. The Commission now has documented examples, and specific areas of inquiry. At the same time, staff shares its concern about the resources that an adequate inquiry would involve, as the Senate Commerce Committee, GAO and FTC were all stopped short of an adequate understanding of this area.